

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

Fred Michael Esguerra, Jr.,

Petitioner,

vs.

State of Alaska,

Respondent.

Superior Court No. 3AN-19-04854CR

Court of Appeals No. A-13819

**OPA's Response to Public Defender Agency's Motion for Full Court  
Reconsideration**

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify that the type font used is Arial 12.5.

This Court has asked the Office of Public Advocacy (OPA) for its position on the Public Defender Agency's contention that "given the Agency's duties and its status as an officer of the court, this Court can accept the Agency's representation that a positional conflict of interest exists without requiring an evidentiary hearing for fact finding." [Order dated June 29, 2021]

OPA's position is that the Public Defender should be required to provide additional information about the factual basis of the asserted conflict, unless disclosing the factual basis would involve disclosing a client's confidential information.<sup>1</sup> To the extent that client confidentiality is not implicated, the Public

<sup>1</sup> ARPC 1.6 ("Confidentiality of Information (a) A lawyer shall not reveal a client's confidence or secret unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation

1 Defender should be required to provide enough information to allow a court to  
2 independently assess whether a positional conflict has been established. If the  
3 Public Defender determines that public disclosure of that basis would be contrary  
4 to one or more clients' interests, it should be allowed to make the disclosure in  
5 either a sealed hearing or a sealed pleading.  
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7 As the agency to which the case will be transferred if the court determines  
8 that a conflict of interest exists, OPA may request to be given access to any such  
9 sealed hearing or filing. If OPA disagrees with the Public Defender's determination  
10 that it has a positional conflict, OPA may ask to be heard on the issue prior to the  
11 court's ruling.  
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13 Judicial oversight in this context is appropriate, despite the Public Defender's  
14 duties as an officer of the court.<sup>2</sup> This is especially true given the nature of  
15 positional conflicts.  
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19 and disclosures permitted by paragraph (b) below or Rule 3.3. For purposes of this  
20 rule, "confidence" means information protected by the attorney-client privilege  
21 under applicable law, and "secret" means other information gained in the  
22 professional relationship if the client has requested it be held confidential or if it is  
23 reasonably foreseeable that disclosure of the information would be embarrassing  
24 or detrimental to the client. In determining whether information relating to  
representation of a client is protected from disclosure under this rule, the lawyer  
shall resolve any uncertainty about whether such information can be revealed  
against revealing the information.").

25 <sup>2</sup> See *Holloway v. Arkansas*, 435 U.S. 475, 487 (1978) (recognizing court's  
26 authority to "explor[e] the adequacy of the basis of defense counsel's  
representations regarding a conflict of interests without improperly requiring  
disclosure of the confidential communications of the client.").

1 First, these conflicts tend to arise at a relatively late stage in the litigation of  
2 a case, which makes the delay involved in transferring the case to conflict counsel  
3 more significant and more detrimental to the client.

4 Second, the definition of “positional conflict” leaves plenty of room for  
5 reasonable minds to disagree.<sup>3</sup> This is true even when, as an officer of the court,  
6 the Public Defender Agency makes its conflict determination in good faith and  
7 complies with its duty of candor to the tribunal.<sup>4</sup> For example, in evaluating the  
8 Public Defender’s asserted positional conflict in *Holt v. State*, this Court accepted  
9 the agency’s factual assertions as true, but nevertheless rejected its “broad  
10 interpretation of what constitutes a disqualifying ‘conflict’” because it would  
11 “seriously impede the functioning of this statewide agency if we held that a conflict  
12 was created every time one Agency attorney argued a legal position that, if  
13 adopted, would disfavor other Agency clients in unrelated cases.”  
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17 <sup>3</sup> See Comment to ARPC 1.7 (“Ordinarily a lawyer may take inconsistent legal  
18 positions in different tribunals at different times on behalf of different clients. The  
19 mere fact that advocating a legal position on behalf of one client might create  
20 precedent adverse to the interests of a client represented by the lawyer in an  
21 unrelated matter does not create a conflict of interest. A conflict of interest exists,  
22 however, if there is a significant risk that a lawyer’s action on behalf of one client  
23 will materially limit the lawyer’s effectiveness in representing another client in a  
24 different case; for example, when a decision favoring one client will create a  
25 precedent likely to seriously weaken the position taken on behalf of the other client.  
26 Factors relevant in determining whether the clients need to be advised of the risk  
include: where the cases are pending, whether the issue is substantive or  
procedural, the temporal relationship between the matters, the significance of the  
issue to the immediate and long-term interests of the clients involved and the  
clients’ reasonable expectations in retaining the lawyer. If there is significant risk of  
material limitation, then absent informed consent of the affected clients, the lawyer  
must refuse one of the representations or withdraw from one or both matters.”).

<sup>4</sup> See ARPC 3.3.

1 Under the Comment to ARPC 1.7, whether a positional conflict exists hinges  
2 on whether there is a “significant” risk that the lawyer’s actions on behalf of one  
3 client will material limit his or her representation of another client and whether a  
4 favorable decision for one client will “likely” create precedent that “seriously”  
5 weakens the position advanced on behalf of another client. The Comment lists  
6 specific factors that are relevant to this assessment, including “where the cases are  
7 pending, whether the issue is substantive or procedural, the temporal relationship  
8 between the matters, the significance of the issue to the immediate and long-term  
9 interests of the clients involved and the clients’ reasonable expectations in retaining  
10 the lawyer.”<sup>5</sup> The Public Defender Agency has not yet provided information  
11  
12 pertaining to these factors.  
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21 <sup>5</sup> See *also* Douglas R. Richmond, Choosing Sides: Issue or Positional Conflicts of  
22 Interest, 51 Fla. L. Rev. 383, 415–16 (1999) (“The test for whether an issue or  
23 positional conflict of interest exists requires affirmative answers to three questions,  
24 of which the first two are closely related and must be considered together. First, is  
25 the issue critically important to both representations? Second, will the  
26 determination of the issue in one case affect its determination in the other  
representation? These first two questions and their answers are sure to be  
intertwined. Third, will the competing important interests materially limit the lawyer's  
representation of one or both clients? This test tracks the current ABA approach to  
issue or positional conflicts.”) (citing ABA Comm. on Ethics and Professional  
Responsibility, Formal Op. 93-377, at 4-5 (1993)).

1 This Court should require the Public Defender Agency to disclose sufficient  
2 information to enable an independent judicial assessment of whether a positional  
3 conflict exists in this case.

4 DATED at Anchorage, Alaska on July 19th, 2021.

6 OFFICE OF PUBLIC ADVOCACY

7  
8 By Elizabeth Russo  
9 Elizabeth Russo  
10 Deputy Director  
11 Alaska Bar No. 0311064  
12  
13  
14

15 This is to certify that on July 19, 2021 a copy of the foregoing  
16 is being delivered to:

17 Kenneth Rosenstein, OCA, ken.rosenstein@alaska.gov  
ocapleadings@alaska.gov

18 Melissa Goldstein, PDA, melissa.goldstein@alaska.gov

19 By: 

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Fred Michael Esguerra, Jr.,

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State of Alaska,

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Superior Court No. 3AN-19-04854CR

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**Motion to Accept Late-Filed Response to Motion for Full Court  
Reconsideration**

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify that the type font used is Arial 12.5.

The Office of Public Advocacy, through Deputy Director Elizabeth Russo, respectfully requests this court accept its response to the Public Defender Agency's Motion for Full Court Reconsideration, which is being filed two business days late. This motion is supported by the attached affidavit.

DATED at Anchorage, Alaska on July 19, 2021.

OFFICE OF PUBLIC ADVOCACY

  
James Stinson, Director  
Alaska Bar No. 0311064

This is to certify that on July 19, 2021 a copy of the foregoing motion and attached affidavit in support are being delivered to:

Kenneth Rosenstein, OCA, ken.rosenstein@alaska.gov  
ocapleadings@alaska.gov  
Melissa Goldstein, PDA, melissa.goldstein@alaska.gov

By: 

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

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Superior Court No. 3AN-19-04854CR

**Affidavit**

STATE OF ALASKA

THIRD JUDICIAL DISTRICT

) ss.

I, Elizabeth Russo, duly sworn, depose and state:

1. I am the Deputy Director of the Office of Public Advocacy.

2. Responses to the Public Defender Agency's Motion for Full Court Reconsideration were due July 15, 2021. The delay in this filing was caused by a combination of out of state travel and a high volume of incoming cases.


3. This request is not meant to delay or hinder this matter.

4. The facts and information in the foregoing are true and correct to the best of my knowledge and understanding.

  
James Stinson, Director  
Alaska Bar No. 1311089

SUBSCRIBED AND SWORN TO before me on July 19, 2021 at  
Anchorage, Alaska.



  
Notary Public in and for Alaska  
My Commission Expires: with office